IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 10 CR 747-3
	)	
ANTONIO EVANS,	)	Chicago, Illinois
	)	August 23, 2012
Defendant.	)	10:25 A.M.

TRANSCRIPT OF PROCEEDINGS - Continued Daubert Hearing
BEFORE THE HONORABLE JOAN HUMPHREY LEFKOW

APPEARANCES:

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(Proceedings had in open court.)

THE CLERK: 10 CR 747 dash 3, USA versus Antonio Evans.

MR. YONAN: Good morning, your Honor. Jason Yonan on behalf of the United States.

THE COURT: Good morning.

MR. COLE: Good morning, your Honor. Samuel Cole on behalf of United States.

THE COURT: Good morning.

MR. BLEGEN: Good morning, Judge. Patrick Blegen and Dan Rufo on behalf of Mr. Evans, who is present.

THE COURT: Good morning.

THE DEFENDANT: Good morning, your Honor.

THE COURT: Good morning, Mr. Evans. All right. You may have a seat, Mr. Evans.

THE DEFENDANT: Yes, ma'am.

THE COURT: Whoever wishes to -- is planning to argue, the others can sit.

Mr. Yonan, you can go first.

MR. YONAN: Sure, Judge.

As I see the evidence in this case, Judge, through the Daubert hearing, there is really a pretty narrow disagreement between the two experts. The disagreement is not about the data in this case. There is really no dispute that a phone, whatever that phone number was, made phone calls, and that

those phone calls hit off of cell towers.

The real disputes is what that data means and how it is interpreted. And I think under these facts, Judge, that is really a jury argument. Daubert is a flexible standard in which the Court is to act as the gatekeeper to establish whether an expert's testimony is relevant and reliable. But the ultimate issue of the credibility and accuracy belongs to the jury.

Now each of the four Daubert factors, Judge -- and I do want to note that not all of those factors are designed to apply in every single case. But the first factors, which I think is the most important, can the techniques -- have the techniques been tested and can they be tested? And I think in this case the testimony was from Special Agent Raschke that the techniques that he used, the methodology that he used has been tested hundreds of times in practical settings. And in many ways that was the difference between the two experts, which I think even Mr. Schenk admitted as well, is that Special Agent Raschke was testifying from his practice, from practical experience; while Mr. Schenk was testifying from a theoretical perspective.

The fact that the FBI, the fact that Special Agent Raschke himself has used these techniques, these methodologies to find fugitives, to find kidnapers, to find bank robbers, to find individuals in a practical setting shows that their

methodology is reliable, and the success achieved shows reliability.

It has also shown by the fact that they teach these methods to other law enforcement agencies. If the methodologies didn't work, they, number one, wouldn't be using them; and, number two, wouldn't be teaching them to other law enforcement agencies for themselves to be used. I think that's a very important factor, Judge. I think it stands unrebutted. There was no testimony to the contrary that the FBI hasn't used these techniques successfully, that the FBI can't use these techniques successfully.

The second factor, peer review, which I think the defense has made a big issue of in some of the filings in opposition to the government's proposed testimony, and, you know, I think this has been peer reviewed. But, frankly, this not the type of testimony that lends itself exactly to be peer reviewed. This is a law enforcement technique that has its best practice in law enforcement. But I do think it has been peer reviewed because the FBI uses it. The FBI analyzes the information. The FBI uses it successfully. They teach it to other law enforcement agencies who also use it as a practice. So I think that it has been peer reviewed. I think we have submitted an article to the Court showing that is has been used in other settings. And your Honor has found other articles in addition, as well, where this same types of techniques and

methodologies have been used. So I do think that shows peer review, Judge.

The known or potential rates of error, I don't think there has been any testimony on that front. The testimony from the FBI is they are not aware of known or potential rates of error. Their testimony is this is a successful way that we find individuals. We find individuals through using cell phones.

General acceptance in the scientific community. The testimony from the FBI was this is what we use. The testimony from -- the FBI receives from cell phone providers is, this is an accurate way to conduct these sorts of methodologies.

Mr. Schenk testified that this is not accepted in the scientific community, but his expertise on that, which he admitted, was when he reads articles on this sort of thing and testifies as a defense expert. I don't think that is general acceptance in the scientific community, Judge.

The testimony is -- it is relevant, it is reasonable, it is reliable under Daubert. It is certainly in no way outside the bounds of scientific principles. And numerous courts have held that, Judge. I have submitted to the Court testimony or cases in which similar types of testimony have been upheld, have been ruled to be acceptable, in some instances not even as expert testimony.

There has been no evidence -- the FBI is not aware of

any -- instance where this has been suppressed under a Daubert theory. And the defendant's arguments are really just weight objections. What Mr. Schenk is testifying to what a radio -- what could a -- a radio wave could do in a vacuum in theory. That's -- I'm not saying that's not relevant, but that's a weight objection. If they would like to call Mr. Schenk to testify about general theoretical aspects of radio waves, and think that's relevant in respect to the evidence that the government has presented, that's fine. If they want to present Mr. Schenk to talk about other factors that could influence why a phone uses a particular cell phone tower, that's fine, but that's weight. That goes to the jury's ultimate conclusion of what's at issue here.

The government doesn't have to prove, and the government isn't even -- you know, Special Agent Raschke isn't testifying or didn't testify or wouldn't testify at trial that the phone is located at that house. He's testifying about general principles of cell phone and general principles of where people -- you know, where these phones were expected to be located with someone using those towers.

So, your Honor, I think in summary -- but I do think, I will say this about Mr. Schenk, and if you would like us to address this afterward, we can do that. There are aspects of his testimony that I don't believe meet the Daubert standard. And if you want me to address that now or if you want me to

address it later --

THE COURT: Well, you haven't really moved to exclude him as a witness.

MR. YONAN: Well, I wouldn't move -- I would not move to exclude him as a witness, Judge. What I would suggest to the Court is, if he is going to testify, that Mr. Blegen informs the Court in to what areas he is going to go into because I do think some of the testimony does not meet the Daubert standard, particularly his testimony about the call detail records and what goes in and what potentially is not on call detail records. He essentially testified that he -- his only knowledge of that was from him -- testimony he heard in another case. That's not reliable. That's not scientific. He has no basis to be an expert on that.

I'm not moving to exclude him under Daubert. If you want to -- if they want to call him to testify about, you know, theoretical principles, that's fine. But that specific aspect of his testimony regarding the call detail regards, there is no basis for that testimony. It is wrong, first of all, and he's got no basis to testify to it.

THE COURT: Okay. Well, we'll put that in the mix of issues.

MR. YONAN: Okay.

THE COURT: Really there are only a couple things here, Mr. Yonan, that bother me about Agent Raschke's

testimony, and that was what I raised with him yesterday about the map and the overlap area.

Now if you will look at this article that we sent you about -- that came from the U.S. Attorney's -- or the Department of Justice, the O'Malley article, using historical cell site analysis evidence in criminal trials.

MR. YONAN: Yes.

THE COURT: At page 28 -- no, no.

Yes? Sorry 27, I believe it is. The very last paragraph. Well, and the -- well, under paragraph B, cell tower locations and sector orientation.

Do you see that?

MR. YONAN: Yes.

THE COURT: And it says the radius of RF signals around the cell tower can vary considerably. But many towers have a radius of several hundred meters to several miles. So I think everyone agrees that that's true.

Now then it goes to RF mapping. And this author says, the second sentence of the second paragraph, mapping the directional orientation and angle of coverage of cell tower sectors is based on the cell provider's business records and mapping of the range of cell tower sectors is based on the cell providers's plan and engineered RF coverage and basic principles of wireless communication. And then it refers you to this picture on the next page.

And then it says, actual RF coverage may be available from some cell providers who measure actual RF coverage within certain cell sectors and maintain business records of actual RF coverage measured to those cell sectors. Otherwise industry standard equipment and software must be used by trained individuals to measure and record the actual RF coverage footprint within a particular cell sector.

Now what I was getting at with Agent Raschke yesterday was how did you get the sectors? That is, it is perfectly intuitive to me to think that that radio frequency wave is diminishing as it gets bigger. But does the scope of his overlap area, is that based on anything other than, I think he said, you know, this is my estimate?

But that -- apparently from this paragraph, I think you could actually tell us that.

MR. YONAN: Well, there is -- they can do what's called a drive test of a tower, where they actually mount equipment on a car, drive around the tower or drive around the other areas for a very precise -- this is the actual range as we have determined by the drive tower.

The government's position in this case was, we do not need that level of precision because the house is right in the middle of the two areas. And that's why he is using his approximation. We're not -- you know, there are absolutely ways to get this -- this call was in this area or this is the

exact sector. We're approximating it because it is so clear it is hitting off these same two towers each and every time during this time period, except for those instances where there is the other, you know, junk tower around Midway Airport, and we have addressed that.

But from our perspective we didn't get to need to do that level of precision because of the frequency of the calls, Judge.

THE COURT: Okay. So you're saying -- are you saying or will your agent testify that because the calls hit off these two towers or one of these two towers every time, that he must have been within the range of these two towers?

MR. YONAN: The coverage these two -- when he sees a phone consistently using these two towers, it indicates to him based on his experience that it is in the coverage overlap area of those two towers.

THE COURT: But the coverage overlap area is much larger than what his map suggests, it is not?

MR. YONAN: Well, I don't know that it is. I don't think it has to be much larger. I think -- what he's doing is using his experience based on the location of the towers to determine what that coverage overlap area is.

THE COURT: Okay.

Now the other issue -- and, Mr. Blegen, you'll be able to respond to these too --

MR. BLEGEN: Good.

THE COURT: -- but two witnesses have a disagreement about how that cell or that radio frequency gets to the switching system. So I would say that one is correct and one is incorrect. I mean, it has to be that way, right?

MR. YONAN: I would agree with that, Judge.

THE COURT: So why do I believe you instead of the other witness?

MR. YONAN: Well, because my witness actually has practical experience. He has actually talked to people who -- network operators, and he's not sitting in the background of a courtroom listening to someone testify, and then testifying under oath that he is an expert and he knows about it.

There is no basis for that testimony at all from Mr. Schenk. He had no idea what he was talking about. And he admitted that his only basis to testify was he heard somebody else testify about it. That is not expert testimony. That doesn't meet Daubert. That doesn't mean basic foundational principles, Judge.

THE COURT: All right. But if he testifies, and I haven't yet heard he is going to be called, are you objecting to his testifying to that?

MR. YONAN: That is what I mentioned, Judge. He is not qualified to testify to that. He cannot -- my opinion

would be that he cannot testify to that. He has no basis to testify to it. He doesn't meet Daubert under that standard, and he doesn't meet the average -- the regular foundational requirements of any witness under that standard, Judge.

THE COURT: Okay. So does the cell tower send out radio waves or is it just receiving them?

MR. YONAN: It receives -- obviously I'm not the expert, Judge.

THE COURT: Yeah, I know.

MR. YONAN: But listening to the testimony, it receives the radio waves from the phones.

THE COURT: It isn't emitting. I know your witness said exactly what you are saying. But is there anything in the literature that you know of the cell tower emitting signals, trying -- and that the cell phone is somehow receiving them?

MR. YONAN: If I am remembering the testimony correctly, the cell phone is constantly scanning for the strongest signal from a tower. That's as I see it. You know, the agent is here, Judge. I am obviously not the expert on how it works. But my understanding is -- it is -- the phone is sending the radio waves to the tower, and it is being accepted by the tower. Now --

THE COURT: And what does the signal actually mean in terms of, you know, electrical that's happening? Can you tell me that?

MR. YONAN: I'm sorry, what do you mean, Judge?
THE COURT: Well, when you say the tower that is sending out the strongest signal is actually emitting something then.
MR. YONAN: The --
THE COURT: You may need to talk to --
MR. YONAN: May I have a moment, Judge?
THE COURT: Yes.
(Brief interruption.)
MR. YONAN: Well, I can certainly -- it might be easier, Judge, to just -- if it is okay with counsel -- I think I can testify to what the agent -- I can tell you what the agent just told me.
THE COURT: Okay. This is a proffer.
MR. YONAN: I mean, the tower transmits and receives. So it receives signals, and it is also looking at the locations where the phone is located, Judge.
THE COURT: So it is a two-way communication.
MR. YONAN: That's correct, Judge.
THE COURT: Okay. So -- all right. Let me hear from Mr. Blegen.
MR. BLEGEN: Judge, I -- with all due respect to the FBI, this technique that they are using is eyeballing, and that's what it is. It doesn't come close to meeting Daubert. The article that you emailed last night, which I am embarrassed

to say we did not find, we have had the other two, but the technical article from the Digital Investigations, that article --

THE COURT: Yes.

MR. BLEGEN: -- that makes perfectly clear that the methods which should be being examined by courts under Daubert are far more scientific and technical than what the agent used here.

The conclusion of this article is that even these techniques which use radio frequency devices, things called Stingrays, which use network engineers with computers and devices that can read radio waves, those things are not even accurate and should be tested under Daubert before they are admitted into court.

But that's -- they are not even coming close to asking to use that here. They are using nebulous eyeballing. The agent finds out where the towers are, and then he says, oh, I think that the range of these things is this far, and, therefore, this is the overlap.

If you notice on the very first page of that article that you found, they say that the sectors that are drawn with perfectly straight lines and perfect circle arcs, that's wrong, not even true.

The sectors are these amoeba looking things that you see on page 186. That's the same sectors. It is right in the

middle of the paragraph -- or in the middle of the page. Each sector will provide service over a particular geographic area, and this area will not be uniform; that is, it will not be a circle, a triangle or any other regular shape.

THE COURT: All right. But it will be generally located around the cell tower.

MR. BLEGEN: Absolutely. And Mr. Schenk testified to that. And, you know, we heard some Mr. -- some criticism of Mr. Schenk today. But in the articles that you found, only one of our experts was ever cited, and was Mr. Schenk, not an FBI agent, and not Agent Raschke. Mr. Schenk is cited in the Law Review article that you found.

And I'll get to my broad Daubert point in a second. But I'm very frustrated over this criticism of Mr. Schenk because what they are saying is he can't testify to something that he heard said under oath in another trial, but Agent Raschke can testify that he heard something from someone at a cell phone company, who he cannot name, did not know on the stand, and said he would never be able to find the person's name.

So we're on the same level there, at the very least of, you know, establishing just a basis to get the testimony in. He doesn't even know the names of the people.

And in other cases, they call a network engineer to come in to testify to these kind of things. And he won't --

they won't say the same thing that Agent Schenk is saying, they will say things similar to the article that you found.

But to get back to the broad point, they have the burden of proof to get this admitted under Daubert. And they have to show, also under 702, that the expert's scientific, technical or other specialized knowledge will help the trier of fact. I agree that if it were specialized knowledge, it could help the trier of fact. Obviously, if you can show where a cell phone is, that could help somebody.

But number two is, the testimony is based on sufficient facts or data. He does not have sufficient facts or data. All he knows is the location of the tower. And even under the article that you found, there are numerous other factors that they are ignoring. And that, with all due respect to Mr. Yonan, does not go to the weight of the evidence, it goes to admissibility under Daubert. This is not some piece of non-technical evidence that you could argue, oh, it goes to the weight. This document may not be 100 percent authentic because it has got some lines through part of it or you can't read all of it or a tape that is a recording, you can't hear everything. There are empty spots. That goes to weight.

Putting in some sort of scientific opinion, you have got -- weight is not the issue, the issue is does it meet Daubert.

Here's some other, from the article that you talked

about or that you found, and that Mr. Schenk talked about are some other things that the agent is missing. He didn't take into the account the height of the antenna. On the article that you found on page 186, you have to take into account the height of antenna, the power used, the location of other cells, the geography of the land. He tried to do that using Google Maps a little bit, including surrounding buildings. He didn't take that into account either.

The only time -- the only thing he said about that is I have been in that neighborhood hundreds of times, and I know what kind of buildings are there. But we're talking about a scientific method here that they have not attempted to establish, and they don't have all -- they haven't even used all the factors to establish their methodology. This is not an issue of weight, it is whether it is a methodology.

According to the Seventh Circuit, a very significant Daubert factor is whether the proffered scientific theory has been subjected to the scientific method. Bradley versus Brown, 42 F.3d 434, Seventh Circuit 1994. They have not subjected this one iota to the scientific method. The scientific method is not talking to your friends at the FBI at the water cooler and saying, hey, this is a great technique, it really works. If the FBI wants to subject this to the scientific method, they should do what scientists do. I'm sure they have scientists working for them or they can hire some of them. They develop a

hypothesis, and then they test it to see if it is true, not after the fact, oh, this is really good for investigations. That's what Daubert requires you to do. Peer review, while not determinative, meaning there are cases that say without peer review you don't automatically exclude scientific evidence, peer review is very important. Peer review subjects the supposed science to the scientific community.

The FBI hasn't published anything on this. And your peers are also not your friends at the FBI, they are other people who are unbiased, people who don't necessarily share the same goals that you do, who necessarily don't share -- have the same biases that you do, have the same desire to say, oh, we can do this very easily. That's what peer review is. And they haven't done any peer review at all. They have not subjected it to error rates or testing, also required by Daubert.

By saying -- and I -- the testimony that he -- Agent Raschke says, I don't know about any time that this didn't work, that's not sufficient. That's not error rate testing. If I asked him, did you ever ask anybody, hey, have you ever come across a time that this didn't work? And he said, no, he never asked anybody that.

So even if you could somehow say that this sort of internal FBI, this really works, is some sort peer of review, it is not because you didn't even ask the relevant question of anybody. You did never say, hey, you know, did you ever try

this once and it didn't work?

And this case is a pretty good example of it. They didn't find the cell phone within this radius. They are presuming that it was in there. But it wasn't. I mean, it wasn't or it may not have been or, more importantly, they don't know.

The government has also suggested that there are other cases where they have been cited where this has been allowed. One of those cases was discussed in the Law Review article that you also found. And I am surprised that the government cites this case, but it is Alems. And it is discussed in the Law Review article on page 70.

In that case what the agent did was that he got the exact same kind of phone, and he drove around. He put the phone in engineering mode so it would display in realtime the connecting sites. Simultaneously he used a device called a Stingray to measure from his location the cell site with the strongest signals.

He did all of those things. Finally he drove around the area, the surrounding cell sites, to approximate its coverage area and points hanging on, but all the time using these devices, meaning the same phone in engineering mode, telling me which towers I am communicating with and this Stringray device. There is nothing like that here.

The agent got some maps out with points and decided to

a draw a circle and said, this is where the estimated range is. That does not come close to meeting Daubert. And it is not an issue of weight, it is issue of admissibility.

The Seventh Circuit has emphasized how important the scientific method is. I have said that before. They have in previous cases thrown out testimony because it didn't meet the scientific method, Chapman versus Maytag, 297 F.3d 682.

Daubert itself talks about the importance of submitting it for peer review. Submission to the scrutiny of the scientific community is a component of good science in part because it increases the likelihood that substantive flaws in the methodology will be detected.

Here we don't even really have a methodology. There is not, I guess, it is -- the name of methodology is granulization, but we couldn't find anything saying granulization has been applied to scrutiny, none of that stuff. And it is -- what has been applied to scrutiny are the things that have been discussed in the article from the United Kingdom that you found, and all of those -- each -- I spent more time than I care to admit reading this last night and trying to figure it out. But what I did conclude is that all of these things, all of the methodologies used in these articles require devices or -- or and the testimony or the -- the work from a network engineer.

But what I think the government is doing, the FBI is

doing, is they are combining a couple of the very basic methodologies that are found on page 188 of the article, but not really doing all of them. It looks to me like they are kind of combining the assessing service areas with the best server prediction plots method, but they don't use all of the requirements for either of those methods. All the other methods are under the radio frequency measurement surveys, and all of those require devices. And even then, even then using devices, as you saw in the article, they did a test in the UK where they had several phones in like a parking garage. Even then phones that were right next to each other were reading different cell towers. And once you know that, once you know that there is no certainty, even remote certainty to which tower a cell phone is going to use, that it is not necessarily based on proximity, not even close, and it is not even based on strength of signal because those things can be overwritten by various things, like line of sight, then you know that this supposed section is frankly nonsense, and it is certainly not good enough to be admitted in court.

There was a significant disagreement, and I think we have the answer now, over the recording which cell tower gets recorded. And Mr. Yonan said that Mr. Schenk is absolutely wrong about that, he's wrong about how the mobile switching center works, and he's wrong about what gets recorded. Well, the articles that you found say that Mr. Schenk was right. And

it is -- I read through it last night. Their own U.S. Attorney, the guy who wrote this article, talks about the mobile switching center. It is on page 20 of the article. It is about three quarters of the way down the page. The third component of a cellular network is the mobile switching center. The mobile switching center is the brains of the cellular networks. It routes voice calls.

THE COURT: Well, I think no one disagrees with that.

MR. BLEGEN: Well --

THE COURT: The question is does the signal get to the computer before it gets to the cell tower.

MR. BLEGEN: That's where the guys from the UK come in. On the very first page of the article from the UK, these gentlemen say that, regarding the recording details, the details vary between networks, but it is usual that only calls which have been connected for longer than a set period of time, typically over one second, are included in the record. And some networks may show details of both ends of a given call.

So what the agent said is that the cell phone connects to the tower with the strongest signal, and then immediately because of the mobile switching network's decision, could get transferred to a different tower.

This paragraph suggests, no, they -- I'm sorry. And then that -- it is that first tower that is recorded. This paragraph suggests that Mr. Schenk is right. That, no, it is

only calls, connections of more than one second that get recorded.

But it doesn't stop there. They discuss again in the section that is discussing directed retries, and that is page 187. I won't read the whole thing. But on the paragraph to the right on page 187, they are talking about the redirection or the direction of a call to a certain tower. And at the end of that -- the paragraph that talks about it, these gentlemen say, the CDR, and that's the records that we are talking about here, may highlight the alternately selected cell as the setting -- starting cell ID for that call.

So this article doesn't tell us with 100 percent certainty that Mr. Schenk is right, but it does tell us with 100 percent certainty that Agent Raschke is wrong; that is, his testimony that, no, the first tower that has any communication at a call is what is recorded on the CDR. This article says, at the very least it may be the alternately selected cell as the starting cell ID for that call.

MR. YONAN: And I would just direct the Court's attention --

THE COURT: That doesn't mean it -- sorry. Just less than a second it doesn't the get recorded anywhere.

MR. BLEGEN: Correct. So it --

MR. YONAN: And --

MR. BLEGEN: So if it goes to a cell for less than a

second, and it is obviously not going to take long, and it gets redirected to a certain tower because of communication traffic, that first tower is not going to be recorded.

THE COURT: Right. But that doesn't mean that there isn't a switching system that comes in after that second tower. That is, the first one just doesn't exist in terms of the --

MR. YONAN: Judge, I would direct your attention to part two, right underneath what Mr. Blegen is reading, call detail records would indicate the first and sometimes the last cell, which a mobile phone connected to at that time and date of the given call or text.

MR. BLEGEN: But that's different than the tower that it uses to communicate with the mobile switching device, and then gets sent to a different tower because of network traffic.

MR. YONAN: But --

MR. BLEGEN: That's the --

THE COURT: Well, right. But it is the one with the -- it is the one with the strongest signal. I don't think that -- well, I'll have to study this more carefully, but I don't think that --

MR. BLEGEN: Can I just say that --

THE COURT: -- Mr. Yonan is wrong or Agent Raschke.

MR. BLEGEN: Well, but the premise is wrong. What he's saying is the mobile switching device, mobile switching

center is relevant. It doesn't matter if Sprint decides to send you to a tower that's not the strongest signal or that's farther away, et cetera, because -- in the FBI's view -- because the first tower that you connect to when that decision is made is the one that is recorded. So, therefore, the CDR, the only records they have here, will say, oh, this tower. But that's according to this article and Mr. Schenk. So now we have two authorities instead of one. That's not accurate.

The call would have to be more than a second connected to the first tower, and this article says that -- now obviously each cell company is different -- but that this one, the CDR may highlight the alternately selected cell as the starting caller, starting cell ID for that call, and that means that -- Mr. Rufo made good a point too.

But that means that it is not going to be the nearest one of the one with the strongest signal, but the one selected by the network. Mr. Rufo also pointed out to me, just above that, that Agent Raschke's testimony is also wrong IN that -- the handset will not necessarily be connected to the strongest cell detected there. And that's -- that's the point, Judge, and that's --

THE COURT: That's because it has been switched because of traffic.

MR. BLEGEN: Correct. And that's -- our position is the one it is switched to is the one that is first recorded,

and this article suggests that Agent Raschke is not right, and Mr. Schenk is correct.

What we have here, Judge, is a -- what we have got is what the Seventh Circuit has previously called and the Maytag, Chapman versus Maytag case, nothing more than unverified statements, unsupported by scientific methodology. That's what we have. He drew some shapes that are not accurate, because they are not going to be perfect geometric shapes. We know that. And he drew them in places that are not -- that he has no basis in science, measurement, mathematics or anything else to say, this is where the circle should end or even close to where the circle should end. They have -- he has no basis to say that. What he has said is training and experience. Those are not scientific.

And he's also said that he spoke to people, but we don't know who those people are. We don't know what their qualifications are. We don't know what they know or would say about this method. But I will tell you in the case of Indiana that we have talked about previously and was discussed before -- and this is a case where Judge Moody in Indiana allowed it in after having a Daubert hearing. The name of the case is Benford --

THE COURT: Yeah.

MR. BLEGEN: -- they did more, significantly more than what was done here. They had a network engineer come out. He

used tools. He talked about the range of the network. He talked about tests and put in evidence of tests that were constantly run on phones and towers. He did all of those things. But even then they didn't use the -- the testimony wasn't admitted to get this narrow overlap, like we have here, the testimony was only used to exclude the guy from being in another state.

THE COURT: Well, right, it was a different issue --

MR. BLEGEN: A different method --

THE COURT: -- so you might need to use a different -- somewhat different method.

Let me just say, I think -- well, let me ask you this, Mr. Blegen. There are some things that are not necessarily -- you can allow an expert without all of this peer review and so on. And, for example, a carpenter learns how to build a stairway. He wants to know how so -- he or she, I should say, but I'll say he because most carpenters are men -- will read the books, they will go to their, you know, how to, and they will build some stairways, and they will figure out how to do it, and they have never really studied physics or whatever else, but that's obviously what's involved. But that carpenter can come in and testify about how to build a stairway or why this stairway is a bad stairway because he has training and experience in building stairways.

So a lot of what's going on here with Agent Raschke is

to sort of set out the principle of how cell phones work. But I don't think your two experts really differ very much on that.

The general principal is that we have these cell towers -- that are just intuitive. We have these cell towers, and they are spaced throughout the city in order to provide coverage. And if a cell phone is in an area, it is going to hit on -- it is typically going to hit on the cell phone tower that is close to them, a cell -- there are exceptions to this. But if that weren't the case, we wouldn't have them throughout the city in very -- you know, well spaced. That's why we call them cells, I guess, because that is a tower that covers a cell in the city. So, I mean, if either expert were asked to testify about that basic principle that would be true.

Now I don't think that the government is saying that it is absolutely certain that the phone was in this area but would be saying -- the witness would be saying it is more likely than not that it was in this area or the phone was in this area.

Now neither your expert or the government's expert is scientifically qualified to talk about this really. I mean, both of them know this because they -- at least Agent Raschke has worked with this, and he's -- you know, he's studying this whole thing.

Now obviously I understand what you are saying, that

the law enforcement community is not a peer group, a scientific peer group. But your witness is even less, you know, experienced with cell phone technology.

So I guess I'm kind of in a quandary here about -- yes, I think it would be better to have a network engineer coming in here and telling us this. But is it such sophisticated technology that we really need that?

MR. BLEGEN: Judge, if they would give us the name of one of the network engineers that they talked to, we'd put a subpoena on them, and then we could find out. But we don't know because they haven't given us the names. I find it very surprising that the FBI, who writes more reports than any agency I have ever seen anyway, doesn't have reports about who Agent Raschke discussed this with, doesn't have network engineers whose names we can be given. Sprint or Nextel, who -- we could find out who they are, who said that these things work, who confirmed Agent Raschke's testimony about these things. If they'd give us the name of a network engineer, we'll put a subpoena on the network engineer. I don't think they are going to say this to the same extent.

I respectfully disagree about Mr. Schenk's qualifications. I think he is eminently qualified. He didn't simply receive some training from other law -- from law enforcement agencies. He is -- not only does he have various degrees that make him qualified, he works setting up the

original -- the precursors to cellular phones. He has worked with radio frequency with the Navy. I won't go through all his qualifications again.

And I disagree that, generally speaking, the closest tower is the one that you would hook to. The article that you found says to the contrary, that it is not. And there are various reasons for that. And one of the reasons is simply how they angle their antennas. They could be -- I could be very close to a tower, but they have it angled at such a way to exclude me for reasons of their own.

THE COURT: But in this case -- well, how does that apply in this case? We know that that cell tower -- you're saying he could have been in a remote location or the phone could have been at a remote location and still hit on the cell?

MR. BLEGEN: What I am saying is that tower or towers could have been selected for reasons other than proximity.

THE COURT: Right, okay.

MR. BLEGEN: Yes, it does have to be sort of in a general nebulous amoeba-shaped area emanating out from that antenna, but it could have been much closer to one of the other towers, but selected this tower because of either the phone company's decision or line of sight.

One of the other factors that, again, discussed in this UK article is whether the -- and some big factors --

whether the phone was in a building or not. That completely throws off this line of sight, best signal, all of these things. And they believe that the phone in question was in somebody's basement at the time it was making the calls, and they haven't taken that into account at all.

I don't want to waste a lot more of the time, Judge. I don't think this comes anywhere close to Daubert. It is -- there is -- the method is estimated. And taking your carpenter analogy into context, carpentry has been around for hundreds and hundreds of years, and carpenters have viewed other's work and those kinds of things. This is new. And this government method, the FBI's method of trying to draw two circles together is new. It is not science. And it is going to go the way of things that have been -- that are starting to get rejected now. It is going to go the way of shaken baby evidence, that was believed to be sacrosanct up until recently.

That's -- this stuff is even farther afield from that because there is no science or math or measurement to it. It is -- the agent, as he said candidly on the stand -- you said, how did you get -- how did you draw the end of this circle? And he said, I estimated it. That's not science, and it shouldn't be permitted under Daubert. It is not admissible.

THE COURT: Okay. You get the last word.

MR. YONAN: Well, if I am understanding Mr. Blegen

correctly, Judge, we're disputing two parts of Government Exhibit Summary 6. The other stuff about -- well, his own expert said, typically it would hit the closest tower, not necessarily. And nobody is saying it has to necessarily hit the closest tower. Agent Raschke didn't say that. That's weight, Judge.

He took -- and the fact of the matter is it hits these -- the towers that show up in these charts, it hits these towers. If Mr. Blegen wants to get up and talk to Agent Raschke about other factors that could influence why a phone hits a tower, that goes to weight.

So that leaves us with these two estimations here, Judge, on Government Exhibit Summary 6. For a phone that used those two towers, almost 200 times over a 36-hour period, those two towers -- and you're right, Judge, in that the government is not saying that the phone was in the basement. It is saying it's in this area. And that's going to corroborate other evidence in the case.

So the government is not saying, look, it shows that he did it because the phone is there. It's corroborative evidence. And if it is not going to hit that tower, it is going to hit another tower in that area. It's being used to generally show this person's location.

What Mr. Blegen has ignored in crossing Agent Raschke and has ignored here today is the practical successes that the

FBI has had using these techniques.

THE COURT: Well, this -- I'm not too persuaded by that because of all the material that's coming up about fingerprint evidence where, you know, the agent would get on the stand and say that this is absolutely, you know, 100 percent accurate. And now, you know, there is -- coming up with information that maybe that wasn't so true. So you -- and you haven't really presented me with any actual cases, you just say, you know, it always works.

MR. YONAN: Well, he -- Agent Raschke testified he himself has used these techniques to find kidnapping victims, to find fugitives, to locate people. That's real life practical successes. That's working with these records, working with these estimations and determining where people are located.

Now with respect to the conversation with the network engineers, he talks with them all the time because he uses these in a practical sense. He's not like Mr. Schenk who is one guy who reads articles and then testifies about cell sites and fingerprints and photographic evidence. He uses this on a day-to-day basis. This is what he does for a living. That is the practical expertise that is required of him, and it is required of the agents that he works with. To me it is apples and oranges.

Mr. Schenk can talk about -- all he wants about

theoretical bases for why a radio wave hits off a tower. But he's never looked at these call detail records to try and find someone. He looks at them to try and basically testify as an expert for criminal defense attorneys.

THE COURT: Well, all I want to do is submit this so it is not a fight in front of the jury. That is, I would like it to be clear that what each person -- are you going to call Mr. Schenk?

MR. BLEGEN: I don't know. It sounds like maybe you're heading in a direction that might require me to call him. But, yes, I'm hoping not to because I don't think it is admissible. I also hope that the government doesn't think it can admit testimony from agents saying this works all the time without providing some basis of fact for that, like a database in the FBI, maybe they keep track of how this works. They probably should if they want it to be admitted at a trial.

What we are hearing is anecdotal word-of-mouth evidence. That's not admissible. That's not admissible at a trial, and it shouldn't make it admissible under Daubert. But, yes, I hope to call him. And maybe we'll try to find our own electrical -- or network engineer if they refuse to give us the names of the ones they consult with. I think they should have to --

MR. YONAN: And for the record --

MR. BLEGEN: -- if they are relying on those people.

MR. YONAN: -- Mr. Blegen has never asked, just for the record.

MR. BLEGEN: I asked the witness.

THE COURT: Well, maybe the witness didn't know on the stand. You know, that's a whole different thing.

MR. YONAN: Judge, one other point, Judge, and it is your analogy about the carpentry work. Agents testify as experts on all sorts of things that aren't necessarily rooted in scientific basis.

THE COURT: Like what drug terms mean.

MR. YONAN: Exactly. That's exactly what I was going to say, Judge. They testify all the time about what their -- their practical training and experience reflects. And that is expert testimony under 702, and it is admitted consistently and routinely, Judge.

THE COURT: All right. Well, I had hoped to be able to decide this today, but I -- I do want to just spend a little more time with it.

MR. YONAN: I'm certainly not offering this, Judge, but we can do Summary Exhibit 6 without the coverage overlaps. If that's what's giving you the hang up -- because the fact of the matter is the phone hits off of those two towers for an extended period of time.

THE COURT: Well, that might help, you know, and I -- I'm just not persuaded that -- yet that the radius of that

or -- yeah, I guess that's what it is -- is based on anything. In fact, the witness said it was just his estimate.

MR. YONAN: But short of that --

THE COURT: It looks like there is a way to measure it. At least that's what your article says from --

MR. YONAN: Short of that, Judge, I don't know what the dispute is here, that a tower could somehow use -- I mean, Special Agent Raschke should still be able to testify based on this chart that in his experience when a phone hits -- consistently hits off of two towers for a long period of time, that it is in the coverage overlap area of those two towers. That's reasonable, reliable, relevant testimony.

If it is the actual spheres that is causing the whole concern, we'll take them out. And -- or the testimony is going to be, it hit off of these two towers for this amount of time, and in my training and experience that means that that call is in coverage overlap for those two towers. I think Mr. Schenk basically testified to as much at trial, Judge.

THE COURT: Yeah, I think he did too.

MR. BLEGEN: And, Judge, I just don't want my silence to be taken as not objecting. I object to all of their exhibits, even the ones that simply say here's a tower and here's -- I think it is like the location where the victim was supposedly kidnapped and then drawing a line, because that type of evidence is not -- I agree you don't have to have scientific

knowledge to say where a cell tower is, what phone hit it, and then draw a line somewhere. But that sort of evidence is not relevant without the other underlying things that they are going to say, which is, and typically it hits off the tower with the best signal, and I think this is the one that would have had the best signal. None of that is relevant to a jury without the other information, which we think is -- they have the testimony, which is not admissible under Daubert because it just isn't accurate.

MR. YONAN: Well, their own expert said it was --

THE COURT: Okay. I think --

MR. YONAN: I mean, I --

THE COURT: -- I heard enough.

MR. YONAN: And, Judge, I'm happy -- if it is going to expedite the Court's ruling on this, we'll do a Summary Exhibit 6 without the spheres. I disagree with Mr. Blegen. I think his own expert basically agreed by and large with everything Agent Raschke said, everything else Agent Raschke said.

Now if he wants to get up and cross Agent Raschke about other factors that could have been used for why this particular tower is -- that's why we have a jury trial, Judge.

MR. BLEGEN: Then we wouldn't need Daubert. Why do we have Daubert? Everything goes to weight. Let's put any kind of wacky scientist up there, and they can say whatever they want. And, I could say, well, gees, you didn't take this --

THE COURT: All right. I will do my best to make the right decision.

MR. BLEGEN: Thank you, Judge.

MR. YONAN: Would you like to us come back, Judge, or --

THE COURT: We'll let you know if we want to do it in open court. I'll have to get to it right away.

MR. YONAN: Thank you.

MR. BLEGEN: Thank you.

(Which concluded the proceedings in the above-entitled matter.)

CERTIFICATE

I HEREBY CERTIFY that the foregoing is a true, correct and complete transcript of the proceedings had at the hearing of the aforementioned cause on the day and date hereof.

/s/ Pamela S. Warren September 7, 2012
Official Court Reporter Date
United States District Court
Northern District of Illinois
Eastern Division